UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 99-1390, 99-1561

DORSEY TRAILERS, INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA AND ITS LOCAL 1868, AFL-CIO, CLC

Intervenors

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

INTRODUCTION

Pursuant to FRAP Rules 35 and 40 and Fourth Circuit Local Rules 35 and 40, the National Labor Relations Board ("the Board") respectfully petitions the

Court for rehearing, and suggests rehearing en banc, of a decision of a panel of this Court (Chief Judge Wilkinson and Circuit Judges Niemeyer and Luttig), issued on December 1, 2000, and reported at 233 F.3d 831.[1] Board counsel express a belief, based on a reasoned and studied professional judgment, that the panel's decision is contrary to decisions of the Supreme Court and other courts of appeals.

The panel reversed the Board's finding that Dorsey Trailers, Inc. ("the Company") violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. § § 151, 158(a)(5) and (1)) ("the Act") by transferring trailer manufacturing operations from Northumberland, Pennsylvania, to Cartersville, Georgia, without bargaining with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 1868, AFL-CIO, CLC ("the Union").[2] In finding that the relocation was a mandatory subject of bargaining, the Board applied the test set forth in *Dubuque Packing Co.,* 303 NLRB 386, 391 (1991), *enforced in pertinent part sub nom. Food and Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24, 30-33 (D.C. Cir. 1993) ("*Dubuque*"). The panel held that *Dubuque* was inconsistent with the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S.

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[1] Judgment was entered on January 10, 2001.

[2] The panel also reversed the Board's finding that the relocation was motivated by protected strike activity and therefore violated Section 8(a)(3) and (1) of the Act. We do not request en banc rehearing on that issue.

666 (1981) ("*First National Maintenance*") and this Court's decision in *Arrow Automotive Industries, Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988) ("*Arrow*"). 233 F.3d at 842-844.

In rejecting the *Dubuque* test even though the Company never argued before the Board that it was improper, the panel disregarded the Supreme Court's decision in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982). Further, the panel's holding that an economically motivated relocation decision is never a mandatory subject of bargaining is inconsistent with *First National Maintenance* and the decisions of two other courts of appeals. The panel's view that tenure of employment is not a "term or condition of employment" within the meaning of Section 8(d) of the Act (29 U.S.C. § 158(d)) is contrary to the Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) ("*Fibreboard*") and numerous decisions of courts of appeals. Finally, the panel's statement that a conditional order to restore unlawfully relocated operations is beyond the Board's remedial power in the absence of a violation of Section 8(a)(3) is contrary to *Fibreboard*.

ARGUMENT

A. The Panel Impermissibly Reversed the Board On a Ground Never Argued Before the Board

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that, when a court of appeals reviews an order of the Board, "[n]o objection that has not been urged

before the Board, . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The Supreme Court has held this provision to be jurisdictional. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982).

Neither questions of statutory construction nor contentions that the Board's decision is contrary to Supreme Court or circuit precedent are exempt from the jurisdictional limitation of Section 10(e). The issue held to be precluded in *Woelke & Romero* was one of statutory construction. Moreover, courts have frequently applied Section 10(e) to claims based on Supreme Court or circuit precedent. *See, e.g., Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1396-1397 (5th Cir. 1983) (refusing to consider argument based on *First National Maintenance* which was never raised before Board); *NLRB v. Konig*, 79 F.3d 354, 359-360 (3d Cir. 1996); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998).[3]

In this case, the administrative law judge, in finding that the relocation decision was a mandatory subject of bargaining, expressly applied the *Dubuque* test (set forth below, p. 5) and said, "The [Company] agrees that *Dubuque* . . . is

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[3] In *NLRB v. Anne Arundel General Hospital*, 561 F.2d 524, 526-528 (4th Cir. 1977) (en banc), this Court suggested that Section 10(e) did not prohibit it from reversing a Board order on the basis of a "purely legal" defect. The Court, however, also concluded that the employer *had* raised the legal issue before the Board. *Id.* at 527-528. To the extent that *Anne Arundel* implies that any "purely legal" issue is exempt from the jurisdictional bar of Section 10(e), it cannot be reconciled with *Woelke & Romero.*

applicable . . .” (A 1527-1528 & n.28.) The Company, in its exceptions to the judge’s decision (A 1550-1565) and supporting brief (A 1577-1639), nowhere excepted to the foregoing statement, and did not even cite *First National Maintenance* or *Arrow,* much less contend that *Dubuque* was inconsistent with either.[4] Accordingly, the panel here was without jurisdiction to pass on the validity of the *Dubuque* test. In rejecting that test when its propriety had never been challenged before the Board, the panel disregarded *Woelke & Romero* and the other cases cited above.

B. The Panel Improperly Rejected the Board’s Reasonable Interpretation of the Act In Favor of an Interpretation Contrary to the Supreme Court’s Decisions

The test adopted by the Board in *Dubuque*, 303 NLRB at 391, for determining when a decision to relocate operations is a mandatory subject of bargaining is as follows:

> The General Counsel has the burden of establishing that the relocation of unit work was unaccompanied by a basic change in the employer’s operations. The employer may prevail by showing either that work previously done at the old plant is to be discontinued, rather than moved to the new location, or that the relocation involves a change in the scope and direction of the enterprise. Alternatively, the employer may prove that labor costs were not a factor in the decision to relocate or that labor cost concessions by the union could not have changed that decision.

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[4] The Company did cite the Board’s decision in *Arrow*, but only on the issue of the appropriate remedy. (A 1621, 1622, 1625.)

This test is reviewable under the standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). If "Congress has directly spoken to the precise question at issue," then "the [reviewing] court as well as the [administrative] agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. But "if the statute is silent or ambiguous with respect to the specific issue, . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by . . . an agency." *Id.* at 843-844. Thus, the *Dubuque* test can be rejected only if it is contrary to statutory language or a prior Supreme Court decision (*see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-540 (1992)), or if it is not "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

The panel rejected *Dubuque* on all three grounds. However, as shown below, its holdings that *Dubuque* is inconsistent with Supreme Court precedent and with statutory language are themselves contrary to Supreme Court precedent, and its holding that *Dubuque* is not a reasonable construction of the Act is erroneous and conflicts with the decisions of two other courts of appeals.

The panel viewed *Dubuque* as "'flatly inconsistent with *First National Maintenance*'" (233 F.2d at 844, quoting *Arrow*, 853 F.2d at 228). In *First National Maintenance*, the Supreme Court held that an employer's decision to *close* part of its business is not a mandatory subject of bargaining. 452 U.S. at 686.

The panel here viewed *First National Maintenance* as equally applicable to an economically motivated decision to *relocate* part of a business and as establishing a *per se* rule that neither decision is a mandatory subject of bargaining. This conclusion is contrary to an explicit statement in *First National Maintenance* that "other types of management decisions, *such as plant relocations*, . . . are to be considered on their particular facts." 452 U.S. at 686 n.22 (emphasis added).

The Court in *First National Maintenance* also stressed "the specific facts of this case." 452 U.S. at 687. Those facts included: (1) the employer "had no intention to replace the discharged employees or to move [the discontinued operation] elsewhere"; and (2) the partial closing was motivated by a customer's refusal to pay an adequate fee--a matter over which the union had no control. *Id.* Here, however, the Company did intend to continue the operations, and did intend to replace the Northumberland workers with workers from the Cartersville area. Moreover, the Union did have some control over the relocation decision, for the Company was willing to remain at Northumberland if the Union accepted its "bullet points" proposals, thereby reducing its labor costs.. The panel was clearly unwarranted in treating these significant factual differences as irrelevant.

The panel also asserted that the language of the Act shows that tenure of employment is not a "term or condition of employment" within the meaning of Section 8(d) of the Act. 233 F.3d at 842-843. This sweeping assertion is directly

contrary to *Fibreboard*, where the Supreme Court, after observing that a contractual restriction on subcontracting of bargaining unit work could properly be considered a "condition of employment," added, "The words even more plainly cover termination of employment . . ." 379 U.S. at 210. Courts of appeals have similarly held in numerous contexts that job tenure is a mandatory subject of bargaining. *See, e.g., NLRB v. Litton Financial Printing*, 893 F.2d 1128, 1133-1135 (9th Cir. 1990) (layoff as effect of nonbargainable management decision); *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684, 688 (2d Cir. 1967) (opportunity to continue employment by transferring to relocated plant).

The panel's contrary conclusion, based on the separate reference to "tenure of employment" in Section 8(a)(3), is clearly unwarranted. The most natural reading of that reference is that Congress viewed discrimination as to tenure of employment as a particularly striking example of the generally prohibited discrimination as to any term or condition of employment, not that Congress viewed the two concepts as mutually exclusive. *Cf. NLRB v. Houston Chapter, Associated General Contractors*, 349 F.2d 449, 451-452 (5th Cir. 1965) (rejecting contention that separate reference to "hire" in Section 8(a)(3), but not in Section 8(d), precludes finding that hiring process is a "term or condition of employment."). The Board's decisions under the original Act, holding in a number of contexts that bargaining over tenure of employment was required, reflected this

view. *See, e.g., Brown-McLaren Mfg. Co.,* 34 NLRB 984, 1008-1009 (1941) (transfer of employees who would otherwise lose jobs as a result of nonbargainable relocation); *Hoosier Veneer Co.*, 21 NLRB 907, 934 (1940) (reinstatement, after reopening of plant, of employees who had been laid off when it was closed), *enforced in pertinent part sub nom. NLRB v. Bachelder*, 120 F.2d 574, 577-578 (7th Cir. 1941).

There is no evidence that Section 8(d)--added to the Act in 1947, while the relevant language in Section 8(a)(3) was retained without change--was intended to overturn these Board decisions. As the Supreme Court observed in *First National Maintenance*, Congress rejected the House bill, which would have limited mandatory bargaining to five specific categories of subjects, including "procedures and practices relating to discharge, suspension, layoff, recall, seniority, and discipline . . .," and chose the less specific Senate language to preserve the Board's authority to define mandatory subjects of bargaining. 452 U.S. at 675, 676 n.14. This history refutes the panel's interpretation of Section 8(d), which would compel a definition of mandatory subjects of bargaining even narrower than the definition in the rejected House bill.

The panel's rejection of *Dubuque* as not representing a reasonable construction of the Act also conflicts with the views of the other two courts of appeals that have considered the question. In *Dubuque* itself, the District of

Columbia Circuit held that the Board's test is "sufficiently protective of an employer's prerogative to manage its business," "accords with Supreme Court precedent," and "establishes rules on which management may plan with a large degree of confidence . . ." *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24, 31, 32, 33 (D.C. Cir. 1993). The Third Circuit has also concluded that *Dubuque* "accurately reflected the framework established by *Fibreboard* and *First National [Maintenance] . . ." Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1246 (3d Cir. 1994).

The panel did not cite the above cases, but relied on *Arrow*, which preceded the Board's decision in *Dubuque*. The panel viewed *Dubuque* as not materially different from the plurality opinion in *Otis Elevator Co.*, 269 NLRB 891 (1984), which this Court rejected in *Arrow.* However, *Dubuque* specifically dealt with this Court's objections to the plurality opinion in *Otis.* While *Arrow* viewed that opinion as requiring bargaining over a decision motivated by labor costs even if it changed the scope or direction of the enterprise, *Dubuque* requires bargaining only where the General Counsel can prove that the decision does *not* entail such a change. 303 NLRB at 391. Similarly, *Arrow* criticized the plurality opinion in *Otis* as "leav[ing] management at sea as to whether it had an obligation to bargain." 853 F.2d at 232. In contrast, the *Dubuque* test "clearly apprises the parties of their obligations at the bargaining table and in litigation." 303 NLRB at

392. Moreover, the Board is not required to "establish standards devoid of ambiguity at the margins." *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24, 33 (D.C. Cir. 1993).

The panel viewed *Dubuque* as creating "a false dichotomy between economic and labor costs." 233 F.3d at 844, citing *Arrow*, 853 F.2d at 228. However, the Supreme Court views the dichotomy as real. In *Fibreboard*, the Court stressed that the subcontracting was motivated by labor costs-- "matters peculiarly suitable for resolution within the collective-bargaining framework. . . ." 379 U.S. at 213-214. In contrast, in *First National Maintenance*, the Court stressed that, the partial closing decision was based on the actions of a third party which had no duty to consider any labor cost concessions the union might offer. 452 U.S. at 688. Thus, the distinction between decisions based on overall economic profitability and decisions based specifically on labor costs, or expressly conditioned on the extent of labor cost concessions the union is willing to make, is legally significant. The panel here erred in treating it as meaningless.

The panel also reasoned that whether a management decision is a mandatory subject of bargaining "'is not dependent on the "partial closing" label.'" 233 F.3d at 842, quoting *Arrow*, 853 F.2d at 230. That is not a valid reason to reject *Dubuque*, which holds that bargaining is not required either where "the work at the new location varies significantly from the work performed at the former plant" or

where a portion of the latter "is to be discontinued entirely and not moved to the new location . . ." 303 NLRB at 391. However, where, as here, the employer, after the relocation, "is producing the same product for the same customers under essentially the same working conditions," its basic operation has not been altered. *Id.* Such a relocation decision is closer in substance to the subcontracting found mandatorily bargainable in *Fibreboard* than to a partial closing.

C. The Panel Improperly Held That the Board's Conditional Restoration Order Is Not a Permissible Remedy For a Violation of Section 8(a)(5)

The Board ordered the Company to reopen the Northumberland plant and reestablish the operations unlawfully transferred to Cartersville, unless it can show in compliance proceedings that such restoration would be unduly burdensome. (A 1663 & n.2, 1692-1693 & n.42.) We do not take issue with the panel's holding that such a remedy would be unwarranted if, as the panel found, the relocation was lawful. However, the panel went on to say that a restoration order is "beyond the authority of the Board" in any case not involving a violation of Section 8(a)(3). 233 F.3d at 845. If, on rehearing, the Court upholds the Board's finding that the relocation violated Section 8(a)(5), it should reject the foregoing statement and enforce the Board's conditional restoration order.

The panel's view that a restoration order is never an appropriate remedy for a Section 8(a)(5) violation is contrary to *Fibreboard*, where the Supreme Court

held that the Board was authorized to issue a restoration order to remedy "loss of employment [which] stems directly from an unfair labor practice . . ." 379 U.S. at 217. This authority depends, not on the motivation for the employer action in issue, but solely on the illegality of that action, for the purpose of any remedial order is to restore the *status quo ante*, not to punish the employer for wrongdoing. *See Republic Steel Co. v. NLRB*, 311 U.S. 7, 11-12 (1940); *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 795 (4th Cir. 1998).

The panel also asserted that a restoration order is "presumptively suspect" because it requires substantial expenditure of funds or investment of capital. 233 F.3d at 845. This assertion disregards the principle, recognized in *Coronet Foods, Inc. v. NLRB*, 158 F.3d at 788, that the employer has the burden of establishing that restoration would impose an undue hardship. A mere assertion that restoration would require expenditure, without evidence as to the amount of expenditure required or the employer's overall size and financial condition, is insufficient. *Power, Inc. v. NLRB*, 40 F.3d 409, 425 (D.C. Cir. 1994). An expenditure which would be an undue burden for a small or financially marginal business is not necessarily so for a large and solidly profitable business.

The present record does not contain any evidence on these factors.[5] Such evidence, as well as evidence of any sale of the plant, which the panel properly declined to consider (233 F.3d at 844 n.*), may be introduced in compliance proceedings before the Board. (A 1663 n.2.) On the present record, the panel clearly erred in holding that a restoration order would not be appropriate even if the relocation violated Section 8(a)(5).

[5] The record does show that the Northumberland plant achieved near-record profits during the first six months of 1995, whereas the Cartersville plant lost money in each of the first ten months of 1996. (A 528, 1365-1366.) This evidence suggests that increased profits at Northumberland might offset any expenditures required to reopen it.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court rehear this case and suggests rehearing *en banc*, and submits that, after rehearing, the Court should affirm the Board's finding that the relocation of operations violated Section 8(a)(5) and enforce the portions of the Board's order, including the conditional restoration order, based on that finding.

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DAVID A. FLEISCHER
Senior Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570
(202) 273-2987

JOHN H. FERGUSON
Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

National Labor Relations Board

February 2001

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	:	
Intervenors	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's petition for rehearing and suggestion for rehearing en banc in the above captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

Michael S. Mitchell, Esq.
Scott D. Schneider, Esq.
James M. Walter, Esq.
Fisher & Phillips LLP
201 St. Charles Avenue, Suite 3710
New Orleans, LA 70170

Stephen A. Yokich, Esq.
Cornfield & Feldman
25 East Washington Street
Suite 1400
Chicago, IL 60602

_____

Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 23rd day of February, 2001

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